



## **Review of Limited Partnerships Act 1907**

### **Introduction**

We are pleased to make this submission to the Department of Business, Enterprise and Innovation on the Limited Partnerships Act 1907.

As a leading international law firm, Maples and Calder is actively involved in many transactions which involve Irish limited partnerships, formed under the 1907 Act. It is our view that the outcome of this consultation should be the reform of Irish limited partnership law, in a manner which creates a robust and modernised limited partnership structure to meet the needs of those investing and doing business in Ireland.

### **1 Question 1. What are the benefits of limited partnerships for the Irish economy?**

- 1.1 Partnerships are a long-standing feature of Irish (and indeed common law) jurisdictions. They represent a structure which allows parties to enter into business, sharing the profits and losses between each other. Limited partnerships are merely a particular form of partnership. Accordingly, it is impossible to consider the benefits of limited partnerships without considering the benefits of the concept of a partnership. This paper does not pretend to set these out in an detail, suffice to say that the concept allows persons (be they individuals or corporate bodies) who wish to undertake joint ventures, business associations or activity with other persons to do so in a flexible, but orderly manner.
- 1.2 In many cases, a partnership is a form of joint venture, with the partnership structure setting out the key terms of the joint venture agreement.
- 1.3 Limited partnerships were initially introduced to allow partners to benefit from limited liability. This is the key differentiating factor between a limited partnership and a general partnership.
- 1.4 As limited partnerships restrict the ability of limited partners to participate in the activity of the partnership (at the risk of losing their limited liability) they are typically used in an investment context where one or more partners (the limited partner) introduces capital or assets which are then managed by the general partner. As the UK Government recently noted, "In the modern world, the limited partnership is the most commonly used structure for private equity and venture capital funds, as well as various other types of private fund."<sup>1</sup>

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<sup>1</sup> See the UK Governments explanatory memorandum in relation to Private Fund Limited Partnerships. [https://www.parliament.uk/documents/DPRR/2016-17/LROs/Private-Fund-Limited-Partnerships-2017/Draft-LR\(Private-Fund-Limited-Partnerships\)Order-2017-ED.pdf](https://www.parliament.uk/documents/DPRR/2016-17/LROs/Private-Fund-Limited-Partnerships-2017/Draft-LR(Private-Fund-Limited-Partnerships)Order-2017-ED.pdf)

- 1.5 Limited partnerships provide benefits to the Irish economy through two key measures.
- (a) Firstly, they provide a structure through which economic activity can occur. They facilitate the conducting of economic activity. In a simple example, an investor may enter into a partnership with a developer. The limited partnership allows the investor to gain exposure to the development, without having to participate in the active management of the business. The developer will act as General Partner. One can argue that such activity could be conducted in another entity, such as a company, or a general partnership, however the limited partnership is frequently chosen. This is because, as a tax transparent entity, it allows each person to be taxed on their share of the profits, based on their own tax profile. It therefore avoids unnecessary layers of taxation.
  - (b) Secondly, Ireland's status as a fund jurisdiction, has led to investors seeking to use Irish limited partnerships as a vehicle through which a number of investors will pool their capital and seek to generate investment returns. While the Irish Investment Limited Partnership under the 1994 Act is available, it is not in widespread usage. Pending reform of that legislation, the 1907 Act is viewed as an appropriate substitute. In the UK, the UK version of the 1907 Limited Partnership (which incidentally is derived from the same 1907 Act) is commonly used. Investors are therefore familiar with the structure. Ireland's status as an EU member state has led to a growth in the interest in the Irish limited partnership, particularly since the Brexit process has gotten underway. Ireland benefits from the use of such structures in that investors use Irish based service providers, such as lawyers, accountants, administrators and directors to establish and operate the structure.

**2 Given developments in the law governing business activity since 1907 is there a continued need for limited partnerships? Please set out any reasons or evidence for your opinion.**

- 2.1 We are of the view that the answer to this question is yes. It is perhaps self-evident from the growth in the numbers of limited partnerships, that there is a desire to use the entities.
- 2.2 Limited partnerships are not an Irish phenomenon. They exist in many jurisdictions including the UK, Luxembourg, the US and elsewhere where they provide the necessary legal relationships for investors to jointly carry on business. Many jurisdictions also offer limited partnerships as fund vehicles, such as the UK and Luxembourg where they are used by international investors as fund vehicles.
- 2.3 We would note that the UK Government, which considered this same question recently concluded that there is a continuing need to offer the LP as a business entity, in particular as an investment vehicle.
- 2.4 It is worth highlighting that the presence or absence of Irish limited partnership law does not prevent non-Irish limited partnerships from investing in or through Ireland. There are multiple examples of non-Irish partnerships being employed in connection with the Irish economy. There are Luxembourg and UK limited partnership acquiring assets, raising funds or seeking investors. It is likely that this trend will merely continue if the Irish limited partnership was dispensed with.

**3 Question 3. Please set out your views on the possible reasons why there has been an increase in limited partnership registrations since the end of 2015.**

3.1 Anecdotally we can express a belief which is based on our experience.

- (a) The return of Irish based individuals to the Irish property market has seen a number of joint ventures formed. Typically, this will involve two or three passive investors who wish to acquire a real estate asset. They will appoint a general partner to manage the development or letting of the asset. The limited partnership structure is attractive because it involves each investor being taxed on their returns directly (as opposed to through a corporate entity).
- (b) In one case, we understand that a significant lending entity was required to alter how it lent to regulated investment funds (such as ICAVs). It required such lending to be to a limited partnership, which was effectively owned by the funds.
- (c) There has been a growth in joint ventures involving Irish and non-Irish investors. As these typically have different tax profiles (e.g. an Irish investor may be subject to tax at 25% whereas a non-resident may be subject to tax at 20%) they may wish to invest via a partnership. This allows each investor to be subject to tax on profits as if they had made the investment directly.
- (d) There has been a significant rise in interest in limited partnerships as a result of Brexit. The common law status of Ireland's limited partnership law has meant that it is attractive to those who would otherwise have used an English or Scottish limited partnership.

**4 Question 4. Please set out your views on whether limited partnerships should be required to use the term "Limited Partnership" in the business name.**

4.1 As a limited partnership does not have legal personality, the use of its business name is not something which is very significant. In executing a contract, the contracting party will usually be the General Partner, acting for and on behalf of the Limited Partnership.

4.2 The business name is typically used only to describe the limited partnership, rather than used by the limited partnership itself. Hence this point is not significant as it may be in the case of a limited company, where the entity itself will execute contracts, or issue documents using its own name.

**5 Question 5. Please set out your views on whether limited partnerships should be required to maintain a principal place of business and a registered office in the State.**

Registered Office

5.1 We consider that it is unnecessary for a limited partnership to be required to maintain a registered office in Ireland. As a partnership, it does not have legal personality, therefore any office can only be legally owned/operated by a person, on behalf of the partnership. Hence the concept of a limited partnership having a registered office is not something which can be readily understood.

5.2 In cases where the general partner of a limited partnership is an Irish limited company, the limited company will have a registered office in the jurisdiction. However, this is a feature of the general partner, rather than the limited partnership. Such an office exists independently from the limited partnership.

- 5.3 There is currently no requirement for the general partner to be maintained in Ireland, therefore the location of the general partner's registered office can move.
- 5.4 If the aim is to have a place in Ireland where legal proceedings can be filed and which can be used as a route through which competent authorities can contact the limited partnership, it appears more appropriate to allow a limited partnership to maintain an office for service in the country.
- 5.5 In many cases, the partners in the partnership will be in Ireland (such as the general partner) will be in Ireland and therefore the need to maintain such a service facility imposes no additional expense. Where this is not the case, or where the partners do not wish to act in this capacity, a third party could be appointed to undertake this role. In the recent UK consultation this was accepted.

#### Principal Place of Business ("PPoB")

- 5.6 We strongly disagree with the proposal to restrict the PPoB to a location in Ireland. Businesses are by their nature becoming increasingly international, and require flexibility to manage themselves in a flexible manner across jurisdictions. Other Irish entities (companies) do not have the formal concept of a PPoB, and as a result there is no restriction on any of these entities maintaining their 'principal place of business' outside Ireland.
- 5.7 Indeed, if one considers a limited partnership which consists of three partners, who merely wish to invest in a single investment (e.g unlisted shares in a company), it is very difficult to determine how there could be a place of business. There is unlikely to be ongoing activity to be undertaken. The concept of a principal place of business connotes some ongoing activity. But in such an investment partnership, this simply may not occur.
- 5.8 In our view, a number of existing limited partnerships conduct a significant amount of their business outside Ireland. Those partnerships may have non-Irish assets, and sophisticated non-Irish professional investors (including large pension funds, insurance companies, endowments and foundations). Although compliant with Irish law, they do not conduct all of their business in Ireland. They would be concerned about the need to relocate their place of business to Ireland (whatever that may mean).

### **6 Question 6. Please set out your views on whether limited partnerships should be required to make an annual return to the Registrar similar to obligations on companies.**

- 6.1 We support the idea of an annual return. In our view, the annual return could replace the current ad hoc filing requirements (other than perhaps for the change of a general partner, which remains a key piece of information for third parties dealing with the partnership).
- 6.2 This should provide an accurate, user-friendly and consolidated annual snapshot of all the information that limited partnerships must disclose under the Limited Partnerships Act 1907.
- 6.3 The annual return should be filed by or on behalf of the general partner and should confirm the basic information such as the name, place of service and status of the partnerships, as well as the details of the general partners.

**7 Question 7. Please set out your views on how the annual return should be made and who should be responsible for making it.**

7.1 The obvious party would be the general partner, but they should be able to delegate this to a third party so that, while the general partner remains obliged, the actual filing should be conducted by an agent.

**8 Question 8. Please set out your views on whether all limited partnerships should be required to file financial statements.**

8.1 We consider introducing such requirements for all limited partnerships is unnecessary. It will serve little purpose and may dissuade the use of Ireland as a jurisdiction in which to establish limited partnerships private investment funds and as the location of fund managers.

8.2 A non-Irish resident investor in Irish assets is under no requirement to deliver financial statements (although of course they may have Irish tax obligations). If such investors participate in non-Irish limited partnerships, they may similarly have no such Irish requirement. The introduction of a requirement to deliver financial statements will therefore merely discourage investors from using Irish limited partnerships, without providing any additional disclosure.

8.3 If enhanced transparency is required for limited partnerships, then other measures such as an annual confirmation statement and AML registration and beneficial ownership regulations should provide the necessary tools and supports. Detailed public disclosure of limited partnerships' financial affairs, or other Companies Act reporting requirements, would not add anything valuable to these new transparency requirements.

8.4 Nor does there seem to be, in itself, any logic in applying Companies Act financial (as opposed to ownership) transparency requirements to limited partnerships. Companies benefit from limited liability. A limited partnership differs from a company in that it (as opposed to its limited partners) does not benefit from limited liability. It must have a general partner whose liability for the debts and obligations of the partnership is unlimited. A person suing a limited partnership is possibly in a legally stronger position in the event of a claim against a limited partnership than against a company. This has frequently been used to justify the absence of a requirement for limited partnerships to file accounts in public.

8.5 Further, there is no need for additional financial transparency vis-a-vis the authorities or investors. Limited partnerships are necessarily tax transparent. The financial information that is of interest to tax authorities is already available through limited partners' individual tax returns. Financial reporting at the level of the limited partnership to investors is already agreed on a contractual basis and provides financial statements to the limited partners.

8.6 We would note that the UK Government reached a similar conclusion recently, concluding that based on the evidence submitted, it did not consider the case has been made for all LPs to prepare accounts and reports in line with limited companies.

**9 Question 9. What are your views on giving the Registrar powers to remove and strike-off limited partnerships from the register?**

9.1 There are benefits in having a mechanism to allow the Registrar to strike off partnerships in a similar manner to the existing regime for companies. The striking-off of a limited partnership should not result in the creation of a general partnership and/or the loss of limited liability for limited partners. As these persons cannot control the business of the partnership, they should not be exposed for any failures on the part of others to maintain the partnership.

9.2 It should not be possible to strike off a LP where the Registrar's concerns related to administrative failures by the general partner. There should be suitable warnings and a timetable set out when the strike off procedure was initiated, and clear rules set out for managing any residual assets from the LP following strike off.

9.3 The Registrar's powers should follow a robust notification procedure for strike off in respect of dissolved LPs and LPs which are no longer carrying on business.

**10 Question 10. What factors do you think should be considered in removing or striking-off limited partnerships from the register?**

10.1 As limited partnerships can frequently tend to be quite passive, in that they share a stream of income, there is a need to ensure that distinct considerations apply.

10.2 It should be possible for a general partnership to elect to strike off a limited partnership, either because it has reached the end of its term, has ceased business, or because partners elect to be struck off.

10.3 It should also be possible for a regulatory authority, or a tax authority, to elect to apply to strike off a partnership, where it is in default under Irish law or regulation and such default is not cured within an appropriate time period.

**11 Question 11. Please provide any other comments you wish to inform the development and direction of policy on limited partnership law.**

11.1 There is merit in considering the benefits of the UK's approach in relation to limited partnerships. Like Ireland, the UK limited partnership structure is governed principally by the Partnership Act 1890, the Limited Partnerships Act 1907 and rules of equity and common law, which have remained largely unchanged for much of the 20th century. As a result, existing UK limited partnership legislation was deemed not been able to accommodate fully the needs of private equity and venture capital funds, a relatively modern international industry that developed in the United States in the latter half of the 20th century. The UK reform which applies solely to private funds structured as limited partnerships ("PFLPs") was intended to eliminate many of the uncertainties and inconveniences associated with existing UK limited partnership law so as to ensure that the UK limited partnership remains the market standard structure for European private equity and venture capital funds and other types of private fund.

11.2 Similar to the PFLP changes in the UK, we are only seeking targeted amendments to the 1907 Act for fund vehicles which constitute alternative investment funds ("AIFs") under the Alternative Investment Fund Managers Directive ("AIFMD")<sup>2</sup> and who are required to appoint an alternative investment fund manager ("AIFM"), responsible for complying with the legal and regulatory provisions of AIFMD.

11.3 Existing treatment of Irish AIFs

(a) The broad definition of an AIF under AIFMD and the Guidelines on Key Concepts of the AIFMD issued by the European Securities and Markets Authority ("ESMA")<sup>3</sup> (the "AIF Definition") are devised to ensure that any vehicle, whether falling under fund legislation or otherwise, is brought within the scope of the AIFMD if it exhibits the characteristics of an AIF. Due to the broad nature of the AIF Definition, any legal

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<sup>2</sup> Directive 2011/61/EU

<sup>3</sup> Guidelines on Key Concepts of the AIFMD, 13.08.2013 ESMA/2013/611.

structure that falls under its scope comes into the remit of AIFMD in Ireland, including not only bespoke funds vehicles known as “collective investment schemes” such as the ICAV, common contractual funds, variable capital companies, unit trusts and investment limited partnerships (“ILPs”) (together, “CIS”), but also any company or other type of entities that meets the AIF Definition, including limited partnerships established under the 1907 Act and real estate investor trusts (“REITs”). As such, where a 1907 LP meets the AIF Definition, it comes under the AIFMD regulatory regime.

- (b) Unlike 1907 LPs and REITs, AIFs established in Ireland under the bespoke CIS legislation (“CIS Legislation”) are also required to undertake the additional step of obtaining authorisation by the Central Bank under its product regimes in order to conduct operations.

#### 11.4 Reasoning for the use of 1907 LPs as AIFs

- (a) The limited partnership is one of the oldest forms of structuring investments and 1907 LPs have long been used as a vehicle for collective investment. Indeed, the original purpose of limited partnerships was to allow the passive investment of equity capital in real assets, whilst providing limited liability protection. As discussed above, limited partnerships are the conventional structure used in the real economy investing space for a variety of reasons (e.g. greater contractual flexibility to allow for investor due diligence and opt-outs, facilitating capital accounting, capital commitments and drawdowns and pay-out structures typically available in this sector) and are the preferred vehicle for such investments internationally. This is no different with the 1907 LP, which provides a further fund vehicle option for managers seeking an Irish domiciled fund structure that is solely subject to the harmonised standards of AIFMD.
- (b) 1907 LPs which constitute AIFs under AIFMD are not authorised by the Central Bank and accordingly are not subject to the product specific rules applicable to CIS. This is attractive to certain sophisticated institutional investors, as noted by the European Investment Fund (“EIF”) at its presentation at the Irish Funds Real Economy Investing Seminar on 17 May 2017, where it highlighted its preference to invest in entities that are subject to the European harmonised protections of AIFMD but not further rules.

#### 11.5 European Harmonised Structures

- (a) Through its Capital Markets Union initiative, the EU wants to promote non-bank funding into the real economy and has devised harmonised fund products to promote real economy investing (the “ELTIF”), venture capital funding (the “EuVECA”) and social impact funding (the “EuSEF”, together with ELTIFs and EuVEVAs (“European Harmonised Structures”). However, because CIS are required by the Central Bank, pursuant to the CIS Legislation, to comply with the AIF Rulebook, European Harmonised Structures set up as a CIS would be subject to two overlapping and conflicting product regimes.
- (b) In discussions with the Central Bank, it has been suggested that the 1907 LP would be a more suitable fund vehicle for structuring European Harmonised Structures, as it would not be subject to the AIF Rulebook. Notwithstanding this, currently, the 1907 LP remains unsuitable for such products, meaning Ireland is not taking full advantage of the opportunity to be a market leader in respect of European Harmonised Structures.

#### 11.6 Brexit

- (a) In light of Brexit, UK limited partnerships will no longer be as attractive a legal structure for private equity and venture capital funds given that they will no longer constitute an EU AIF and therefore will not benefit from the marketing passport operating under AIFMD.
- (b) Given that UK and Irish limited partnership legislation originates from the same origin, it is expected that post Brexit, there will be a strong interest among UK fund sponsors to use the Irish 1907 LPs as a collective investment fund vehicle for real asset investments. In order for Ireland to maximise this opportunity, it is essential that the 1907 Act is updated in line the series of amendments introduced in the UK, including the PFLP amendments. Without such amendments it would be difficult to promote the Irish 1907 LP.

#### 11.7 Expansion of Financial Services outside Dublin

- (a) If there was reform of limited partnership law, through a process of modernisation and reform, there is merit in considering whether the administrative centre of limited partnerships in Ireland should be outside Ireland.
- (b) There is merit in considering locating the registration and related administrative functions associated with limited partnerships in a location outside of Dublin. This would involve relocating those functions to perhaps Cork, or Galway, rather than being within the existing CRO.
- (c) In this regard, it is worth noting the significant limited partnership related industry currently in Edinburgh to serve Scottish Limited Partnerships. Although there are specific reasons why this industry evolved (primarily relating to the fact that Scottish Limited Partnerships have legal personality) it illustrates how a small change in administrative practice (Scottish limited partnerships must be created via the Companies House in Edinburgh), can have positive economic impacts in a specific area.